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Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1992

EMERY L. NEGONSOTT,  
*Petitioner,*

v.

HAROLD SAMUELS, WARDEN, *et al.,*  
*Respondents.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit

BRIEF FOR PETITIONER

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### **QUESTION PRESENTED**

Whether 18 U.S.C. section 3243 confers concurrent criminal jurisdiction on the State of Kansas to prosecute Petitioner for the crime of aggravated battery, one of the crimes included in the Major Crimes Act, 18 U.S.C. section 1153, when the prosecution of such crimes is within the exclusive jurisdiction of the Federal Courts.

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**BRIEF FOR PETITIONER**

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**OPINIONS BELOW**

The opinion of court of appeals (JA 17-30) is reported at 933 F.2d 818 (10th Cir.1991). The opinion of the district court (JA 11-16) is reported at 696 F.Supp. 561 (D.Kan.1988). The opinion of the Kansas Supreme Court (JA 3-10) is reported at 239 Kan. 117, 716 P.2d 585 (1986).

**JURISDICTION**

The judgment of the court of appeals was entered on May 8, 1991. The petition for writ of certiorari was filed on August 5, 1991, and was granted on June 29, 1992. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

### STATUTORY PROVISIONS INVOLVED

This case involves 18 U.S.C. section 3243:

Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

This case also concerns the Major Crimes Act, 18 U.S.C. Section 1153:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (18 U.S.C.S. section 2241, et seq.), incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title (18 U.S.C.S. section 661) within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

### STATEMENT OF THE CASE

This is an Indian criminal jurisdiction issue challenging the jurisdiction of the State of Kansas to prosecute Petitioner under 18 U.S.C. section 3243 for the crime of aggravated battery, a crime enumerated in the Major Crimes Act, 18 U.S.C. section 1153.

The facts of this case are not in dispute. Petitioner, Emery L. Negonsott is an enrolled member of the Kickapoo Tribe in Kansas and a resident of the Kickapoo reservation. On January 3, 1985 a complaint charging the Petitioner with the offense of aggravated battery in violation of K.S.A. 21-3414 was filed in the District Court of Brown County, Kansas. (JA 1) Petitioner was accused of shooting another Kickapoo Indian within the confines of the Kickapoo Reservation. Petitioner was arrested and on March 26, 1985 found guilty of the offense after a jury trial. (JA 1) On April 11, 1985, Petitioner's counsel filed a motion to dismiss on the basis that the prosecution of Petitioner was within the exclusive jurisdiction of the federal courts under the Major Crimes Act, 18 U.S.C. Section 3243. (JA 1) Judge Stevenson, the trial judge, relying on *State of Kansas v. Mitchell*, 231 Kan. 142, 642 P.2d 981 (1982), set aside the conviction for lack of criminal subject matter jurisdiction. (JA 1) The State of Kansas appealed Judge Stevenson's order to the Kansas Supreme Court. (JA 1) Overturning their 1982 decision in *Mitchell*, the Kansas Supreme Court reversed the order of the Brown County District Court. *State of Kansas v. Negonsott*, 239 Kan. 127, 716 P.2d 585 (1986). (JA 1) The Kansas Supreme Court held that the state courts retained concurrent jurisdiction with the federal courts over crimes listed in the Major Crimes Act. The court based its holding on an interpretation of the legislative history of the Kansas Act. 239 Kan. at 577-578.

Petitioner's case was remanded to the District Court for sentencing and he was sentenced to a term of three

to ten years. (JA 1) Petitioner served eighteen (18) months of his sentence in a state correctional facility.

On February 5, 1988, Petitioner filed a writ of habeas corpus with the United States District Court for the District of Kansas (JA 1), challenging the jurisdiction of the state court. On September 22, 1988 the writ was dismissed. (JA 2) In dismissing the writ, the district court held that the state and federal courts had concurrent jurisdiction over a crime enumerated in the Major Crimes Act. *Negonsott v. Samuels*, 696 F.Supp. 561, 562-63 (D. Kan. 1988). The district court based its decision on the legislative history of the Kansas Act.

On October 21, 1988, the decision of the District Court was appealed to the Tenth Circuit Court of Appeals. (JA 2). The court of appeals upheld the decision of the lower court. The appellate court found the language of the Kansas Act ambiguous, analyzed the legislative history of the Act and concluded that Congress intended to confer concurrent jurisdiction on both the federal courts and the Kansas courts over state-defined crimes listed in the Major Crimes Act.

#### SUMMARY OF ARGUMENT

The Major Crimes Act, 18 U.S.C. section 1153 provides for exclusive federal jurisdiction over an Indian defendant who commits a crime enumerated in that Act against another Indian within Indian Country. Petitioner's crime of aggravated battery is denied for purposes of federal jurisdiction in 18 U.S.C. Section 113(c) and (f) (assault with a dangerous weapon and assault resulting in serious bodily injury).

18 U.S.C. section 3243 (the "Kansas Act"), passed by Congress in 1940, granted to the State of Kansas criminal jurisdiction "to the same extent as its courts had jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State." However, the Act did "not deprive the courts of the United States of

jurisdiction over offenses defined by the laws of the United States."

Petitioner contends that the Kansas Act interpreted in conjunction with the Major Crimes Act granted the State of Kansas criminal jurisdiction only over misdemeanor offenses, while retaining exclusive federal jurisdiction over Major Crimes.

An analysis of the entire legislative history, in particular the letter from Congressman Lambertson, and the analysis of the legislative history of the Kansas Act by the Federal District Court and the Eighth Circuit Court of Appeals in *Youngbear v. Brewer*, 415 F.Supp. 807 (N.D. Iowa 1976), *aff'd* 549 F.2d 74 (8th Cir. 1977) supports Petitioner's position and clearly shows that the Kansas Act granted the state jurisdiction over misdemeanor offenses while reserving exclusive federal jurisdiction over felony offenses enumerated in the Major Crimes Act.

The decision of the Tenth Circuit, holding otherwise, is erroneous.

#### ARGUMENT

**WHETHER 18 U.S.C. SECTION 3243 CONFERS JURISDICTION ON THE STATE OF KANSAS TO PROSECUTE PETITIONER FOR THE CRIME OF AGGRAVATED BATTERY, ONE OF THE CRIMES INCLUDED IN THE MAJOR CRIMES ACT, 18 U.S.C. SECTION 1153, WHEN THE PROSECUTION OF SUCH CRIMES IS WITHIN THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURTS.**

**A. The Federal Courts Have Exclusive Jurisdiction Over a Crime Enumerated in the Major Crimes Act.**

18 U.S.C. Section 3243 provides:

Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same

extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The court of appeals found that the Kansas Act conferred concurrent criminal jurisdiction on the State of Kansas to prosecute Petitioner for a offense enumerated in the Major Crimes Act. *Negonsott*, at 824. The failure of the Court of appeals to recognize and uphold the exclusivity of federal jurisdiction under the Major Crimes Act is inconsistent with prior decisions of this Court. The analysis by the court of appeals of the Kansas Act gives full effect to that Act, while ignoring and negating the import of the Major Crimes Act.

The Major Crimes Act provides:

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A (18 U.S.C.S. section 2241, et seq.), incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title (18 U.S.C.S section 661) within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offenses referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offenses was committed as are in force at the time of such offense.

A separate statute governs jurisdiction and venue for offenses under the Act:

All Indians committing any offense listed in the first paragraph of and punishable under section 1153 (relating to offenses committed within Indian country) of this title shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States.

18 U.S.C. Section 3242.

The Major Crimes Act was passed by Congress in 1885 to fill the jurisdictional void created by the case of *Ex Parte Crow Dog*, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030 (1883). In that case an Indian was accused of murdering another Indian in Indian Country. The issue before this Court was whether a South Dakota court, acting as a circuit court of the United States had jurisdiction to prosecute the defendant. This Court held that it did not and that the only entity with jurisdiction to prosecute Crow Dog was his tribe.

Since its passage in 1885 the Major Crimes Act has been consistently held to vest the United States District Courts with exclusive subject matter jurisdiction over its enumerated offenses.

The first case to interpret the Major Crimes Act was *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886) which held that the Act conferred *exclusive federal jurisdiction* over the enumerated federal crimes. *Kagama*, at 384. In analyzing the Major Crimes Act, this Court stated its reasons for holding that federal jurisdiction was exclusive:

These Indian Tribes are the wards of the Nation. They are communities dependent on the United States . . . dependent for their political rights. They owe no allegiance to the States and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their

deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress whenever the question has arisen . . .

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the Tribes.

*Kagama*, at 384-385.

In other words, the purpose of the Major Crimes Act is to protect Indian people from the prejudices of their non-Indian neighbors and to preclude state legislative interference in their affairs.

This Court has consistently reaffirmed the jurisdictional exclusivity of the Major Crimes Act in subsequent decisions. *Keeble v. United States*, 412 U.S. 205, 209-212, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 259, 3 L.Ed.2d 251 (1959); *United States v. John*, 437 U.S. 6, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

Despite the decisions of this Court, the court of appeals held that Congress impliedly modified this exclusive jurisdiction of the federal courts by the second sentence of the Kansas Act which retains federal jurisdiction over "offenses defined by the laws of the United States committed by or against Indians on Indian reservations." *Negonsott*, at 823.

Had Congress wished to modify the Major Crimes Act it could have done so by passing the first version of the bill which expressly provided for concurrent jurisdiction and which explicitly modified the Major Crimes Act.

The statute as originally drafted provided:

Be it enacted . . . That *concurrent* jurisdiction is hereby relinquished to the State of Kansas to prosecute Indians and other for offenses by or against Indians or others, committed on Indian reservations in Kansas, including trust or restricted allotments, to the same extent as its courts have jurisdiction for offenses committed elsewhere within the state in accordance with the laws of the State; and section 328 of the Act of March 4, 1909 (35 Stat. 1152), as amended by the Act of June 28, 1932 (47 Stat. 337), and sections 2145 and 2146 of the United States Revised Statutes (U.S.C., title 18, section 548, title 25, secs. 217, 218 are modified accordingly insofar as they apply to Indian reservations or Indian country in the said State of Kansas.

86 Cong. Rec. 5596 (1940). (Emphasis added.)

Petitioner argued before the court of appeals that the deletion of the word "concurrent" and the elimination of the reference to modify the Major Crimes Act showed that Congress did not intend to grant Kansas concurrent jurisdiction over crimes enumerated in the Act.

Both the court of appeals and the Solicitor General, in his amicus brief, excuse the failure of Congress to pass the initial version by reference to Secretary Burlew's letter. The court of appeals stated:

The term "concurrent jurisdiction" was thus removed because it did not accurately describe the bill in any of its forms. Federal courts did not exercise jurisdiction over all state-law offenses, and therefore those courts would not be sharing concurrent jurisdiction with Kansas over all crimes. Conversely, federal

courts under the Major Crimes Act possessed exclusive jurisdiction over the crimes enumerated therein. At the time of its enactment, the Kansas Act was to confer concurrent jurisdiction only as to those crimes covered by the Major Crimes Act. As explained by the Secretary, Congress' decision to excise the word "concurrent" from the title of the Act was to clarify rather than to change its substance. Reference to modification of the Major Crimes Act was apparently dropped as unnecessary when the second sentence of the Kansas Act was added instead.

*Negonsott*, at 823.

If, as Mr. Burlew stated, the first version of the bill did not reflect the true situation as it existed in Kansas, all Congress had to do was change a few words in this initial version to clarify that Kansas and the federal courts were to have concurrent jurisdiction over the major crimes.

Second, no matter what the practice in Kansas may have been the only entity with jurisdiction over major crimes was the federal courts. In order to change this, Congress would have had to explicitly repeal or modify the Major Crimes Act as it pertained to Kansas. Yet, Congress failed to do so. "When legislators delete language, we may assume that they intended to eliminate the effect of the previous wording." *Youngbear v. Brewer*, 415 F.Supp. 807, 813, (N.D. Iowa 1976) *aff'd*, 549 F.2d 74 (8th Cir. 1977); *Stewart v. Ragland*, 934 F.2d 1033 (9th Cir. 1991).

When Congress wishes to convey criminal jurisdiction to states, Congress makes that intent unequivocally clear. In 1953, during the termination era, Congress passed a law commonly referred to as Public Law 280. P.L. 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588), codified at 18 U.S.C. section 1162 transferred criminal jurisdiction over Indian country from the federal to state governments in five states. The language of 18 U.S.C. section 1162 is unequivocal and specific:

(a) Each of the States of Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:  
...

(c) The provisions of sections 1152 and 1153 of this chapter (18 U.S.C. section 1152 and 1153) shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

Surely Congress would have been just as specific in drafting 18 U.S.C. Section 3243 as it had been in drafting 18 U.S.C. Section 1162, had it wished to grant concurrent jurisdiction under the Kansas Act to the state for major crimes.

This Court can only conclude that by deleting the word "concurrent" and eliminating any reference to the Major Crimes Act, Congress intended to retain exclusive federal jurisdiction over the Major Crimes Act. For when Congress changes a jurisdictional scheme by vesting states with jurisdiction it does so with clarity and precision.

Moreover, absent a clear expression of Congressional intent, the state of Kansas and the federal courts cannot have concurrent jurisdiction over offenses included in the Major Crimes Act. To hold otherwise would violate the rules of statutory construction developed by this Court.

The first rule of statutory construction in relation to Indians requires that laws must be liberally construed to favor Indians and that ambiguous statutes should be liberally construed in favor of Indians and not to their prejudice. *Bryan v. Itasca County*, 426 U.S. 373, 96 S.Ct.

2102, 48 L.Ed.2d 710 (1976); *Antoine v. Washington*, 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975).

This canon of construction is based on the special trust relationship between the United States and Indian people first articulated by this Court in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The Cherokee Nation sued the State of Georgia to enjoin enforcement of state laws on their reservation. This Court held that it lacked original jurisdiction because the tribe, although a distinct political society, was neither a state of the United States nor a foreign state and therefore not entitled to bring the suit initially in this court. *Cherokee Nation v. Georgia*, at 19. The court concluded that Indian tribes:

may, more correctly, perhaps, be denominated domestic dependent nations . . . in a state of pupillage . . . their relation to the United States resembles that of a ward to his guardian.

*Id.*, at 17.

Since *Cherokee Nation v. Georgia*, federal actions toward Indians, whether by treaty, statute, agreement, executive order or administrative regulation, have been construed in light of this trust responsibility. The canons of construction mandate for broad construction when the issue is whether Indian rights are reserved or established, and for a narrow construction when Indian rights are to be abrogated or limited. Above all, when Congress is exercising its authority over Indians, the trust obligation requires that Congressional statutes be based on a determination that Indians will be protected. F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 221-225 (1982).

To interpret 18 U.S.C. section 3243 as the Tenth Circuit has would work to the prejudice of the Indian tribes of Kansas.

First, the court of appeal's interpretation would eliminate the historically exclusive stewardship of the federal

government over major crimes committed by Indians on the reservation. *United States v. Kagama*, at page 384.

If this Court accepts the argument that the State of Kansas and the federal government have concurrent jurisdiction over major crimes, tribal members would be subject to double prosecution since the State of Kansas and the United States government are separate sovereigns. *United States v. John*, 437 U.S. 6324, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978).

(Assumption of state jurisdiction over major crimes) would also subject the Sac and Fox to the difficulties of conforming their behavior to the standards to two sovereigns, and perhaps thereby incur a double prosecution for essentially one offense . . . Such a result is clearly not favorable to the Sac and Fox Tribe and should only be accomplished by explicit direction from Congress.

*Youngbear*, at 812.

It is inconceivable that Congress would pass a law subjecting a Kansas Indian to prosecution under both the state and federal courts.

The court of appeals dismissed this argument of Petitioner's by stating that no one has ever been subject to double prosecution and that this burden applies to all Americans who live under overlapping federal and state jurisdiction. The court goes on to state that when Kansas prosecutes under the Kansas Act the state is acting as an arm of the federal government and therefore federal prosecution would be barred. *Negonsott*, at 823-824.

The argument that no Indian has even been prosecuted by both the state and federal courts in Kansas begs the question and makes light of the responsibility of the federal government in its relationship to Indian people. Congress cannot pass laws which leave Indian people victim to the threat of double prosecution. Moreover, the State of Kansas is not an arm of the federal government, the state is a separate sovereign.

This threat of double prosecution certainly does not work to the benefit of the Indians of Kansas and violates this first canon of statutory construction.

The second canon of construction provides that federal statutes should be construed so as to avoid implicit repeals. *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). The Tenth Circuit's interpretation of 18 U.S.C. section 3243 works a repeal of the Major Crimes Act, a statute passed for the benefit of Indians. As Petitioner has argued, if Congress desired to repeal or modify the Major Crimes Act as it applied to the Indians in Kansas, Congress could have done so and that intention would have been clearly stated in the language of 18 U.S.C. section 3243.

Since there is no clear expression of congressional intent in either the wording of 18 U.S.C. section 3243 or in its legislative history, and since ambiguous statutes must be interpreted in favor of Indians, the Kansas Act must be interpreted by this court as relinquishing criminal jurisdiction to the State of Kansas for misdemeanor offenses while retaining exclusive federal jurisdiction over major crimes.

In his amicus brief the Solicitor General cites an additional federal statute which granted criminal jurisdiction to New York, Act of July 2, 1948 ch. 809, 62 Stat. 1224, codified at 25 U.S.C. section 232 and urges this court to compare the New York statute to the Kansas Act. This statute differs from the jurisdictional grant to Kansas in that it lacks a proviso expressly preserving federal jurisdiction and therefore the case cited by the Solicitor General, *United States v. Cook*, 922 F.2d 1025 (2d Cir. 1991), cert. denied, 111 S.Ct. 2235 (1991) is irrelevant.

In the *Cook* case, the Indian defendants challenged their convictions under federal gambling statutes 15 U.S.C. section 1175 (1988), which prohibited the use and

possession of gambling devices in Indian country. The defendants argued that New York State had exclusive jurisdiction under 25 U.S.C. Section 232. The Court was not called upon and indeed did not resolve the scope of New York's jurisdiction under the Major Crimes Act since federal gambling statutes are not crimes enumerated in the Act. The Court held:

The plain language of the statute leads us to conclude that section 232 extended concurrent jurisdiction to the State of New York. If Congress intended by enacting 25 U.S.C. section 232 to surrender all federal jurisdiction, it could have said so in 1948 when section 232 was enacted. That is exactly what it did in 1970 when it amended 18 U.S.C. section 1162 to give six states exclusive jurisdiction over criminal and private civil matters involving Indian reservations within the particular state.

The decision of the Second Circuit may well have been different were the court analyzing a statute similar to the Kansas statute. Since the New York and Kansas statutes are not similar the two statutes cannot be compared and the Second Circuit's analysis of the New York statute should have no bearing on this case.

An analysis of the Major Crimes Act and the Kansas Act shows that Congress intended to retain exclusive criminal jurisdiction over the major crimes with the federal court.

#### **B. The Legislative History of 18 U.S.C. Section 3243 Supports Petitioner's Position.**

The legislative history of 18 U.S.C. section 3243 shows the intent of Congress to confer criminal jurisdiction on the state of Kansas for misdemeanor crimes and retain exclusive jurisdiction over major crimes with the federal courts.

In determining whether the "the federal grant of criminal jurisdiction found in 18 U.S.C. section 3243

extended to state-law offenses that are also crimes enumerated in the Major Crimes Act," *Negonsott*, at 819, the Court of Appeals was required to analyze the legislative history of the Kansas Act because of the Act's ambiguity. The court found the statute ambiguous because the first sentence unambiguously conferred criminal jurisdiction on the state over "all types" of state crimes while the second sentence "appears intended to ensure that the congressional grant of jurisdiction to Kansas courts over state-law crimes contained in the first sentence would not "deprive" the United States courts of its jurisdiction over federally-defined offenses committed by or against Indians on Indian reservations. The ambiguity exists because federal jurisdiction over major crimes committed by Indian "would otherwise be exclusive." *Negonsott*, at 820.

A careful analysis of the legislative history leaves little doubt that Congress intended to preserve exclusive federal jurisdiction over a Kansas Indian who committed one of the major crimes.

As indicated in the previous section the Kansas Act was significantly amended by the Congress before it was ultimately passed into law. The amendments deleted all references to concurrent jurisdiction and to modification of the Major Crimes Act. 86 Cong. Rec. 5596 (1940). The court of appeals found these amendments insignificant:

The term "concurrent jurisdiction" was thus removed because it did not accurately describe the bill in any of its forms. Federal courts did not exercise jurisdiction over all state-law offenses, and therefore those courts would not be sharing concurrent jurisdiction with Kansas over all crimes. Conversely, federal courts under the Major Crimes Act possessed exclusive jurisdiction over the crimes enumerated therein. At the time of its enactment, the Kansas Act was to confer concurrent jurisdiction only as to those crimes covered by the Major Crimes Act. As explained by

the Secretary, Congress' decision to excise the word "concurrent" from the title of the Act was to clarify rather than to change its substance. Reference to modification of the Major Crimes Act was apparently dropped as unnecessary when the second sentence of the Kansas Act was added instead.

*Negonsott*, at 823.

However, as the court in *Youngbear*, at 813 stated:

By deleting this language, the only intent which can reasonably be inferred to Congress was to preserve exclusive Federal jurisdiction over the major crimes.

Evidence of the intent of Congress to preserve exclusive jurisdiction is further indicated by the letter from Congressman Lambertson which shows that Congress did not intend to relinquish jurisdiction over the major crimes to the State of Kansas. This letter, in its entirety, states as follows:

I want to urge that you recommend out of the committee H.R. 3048 with the requested change in language in one place. All parties are agreed on this bill—the Indians, the superintendent, the Indian agencies on the Kansas reservations, which are all in my district, and the people that are on and surround the reservations.

This bill has been O.K.'d by the Indian office through the Indian Department and I understand by the Department of Justice and no objection found to it by the Budget. The Government here *relinquishes to the State full jurisdiction over the Indians for small offenses*. It will be in the interest of law and order and a unified law enforcement.

I sincerely hope that the committee recommends the bill for passage.

H.R. Rep. No. 1999, 76th Cong., 3d Sess. at 1 (1940).

The Court of Appeals and the Solicitor General have dismissed this letter<sup>1</sup> by stating:

It is also possible that Representative Lambertson understood the bill to confer "full" jurisdiction over small crimes occurring among Indians to fill the void left by the tribal courts, while conferring concurrent power to prosecute the types of crimes covered by the Major Crimes Act. If we give credence to Negonsott's interpretation we are at a loss to explain why it contravenes the memorandum and letter from the Secretary of the Interior which clearly evince an understanding that Kansas under the Act as amended could exercise criminal jurisdiction over all state-law crimes occurring on Indian land.

*Negonsott*, at 822.

The Kansas Act was the first to confer criminal jurisdiction on a state and in light of the Major Crimes Act, it is difficult to believe that reference to the most important part of the legislation would be missing from the Congressman's letter. The failure to refer to "major" as well as "small" offenses shows that Congress never intended to confer concurrent jurisdiction on the state courts over major crimes. And the reference to "unified law enforcement" can only mean the state prosecuting "small" offenses and the federal courts prosecuting major crimes.

Two other documents are part of the legislative history. One is a letter from then Acting Secretary of the Interior, E.K. Burlew and an undated memorandum submitted by the Department of the Interior enclosed with Mr. Burlew's letter. The court of appeals placed unwarranted emphasis on these two documents.

<sup>1</sup> In the case of *Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas*, 787 F.2d 1435 (10th Cir. 1986), the Tenth Circuit held that this letter from Congressman Lambertson was the most persuasive evidence of congressional intent. 787 F.2d at 1440.

The court quoted extensively from the letter of Acting Secretary E.K. Burlew, H.R. Rep. No. 1999, 76th Cong., 3d Sess. 2 (1940).

"The Secretary noted that federal jurisdiction over crimes concerning Indians on Indian land has been limited, leaving 'some major crimes as well as practically all minor offenses outside the jurisdiction of the Federal courts.'" House Report at 2. Because the state lacked jurisdiction over such offenses, maintenance of law and order depended on the tribal courts, which had not functioned on Kansas reservations for many years. To fill this void, and with the consent of the tribes concerned, the State courts had undertaken the punishment of offenses, including those covered by the federal statutes. The legality of this practice had been questioned, and the tribes had allegedly requested enactment of legislation to continue the state practice by a transfer of jurisdiction to the State.

According to the Court of Appeals this report "reflects an understanding that the proposed legislation would legalize the State's assertion of complete criminal jurisdiction under state law over the Indian tribes without depriving the federal court of its more limited criminal jurisdiction by virtue of preexisting jurisdictional grants such as the Major Crimes Act. *Negonsott*, at 822.

Petitioner contends that the letter and memorandum from the Department of the Interior, dated March 16, 1940 refers to the original bill discussed in the previous section of this brief. This bill was drafted by the Interior Department and would have explicitly granted concurrent jurisdiction to the State of Kansas and would have explicitly amended the Major Crimes Act as it pertained to Indians residing on reservations in the State of Kansas. *Youngbear v. Brewer*, at page 813, no. 5. This contention is supported by the language found in the letter of memorandum. For example, the memorandum accompanying Secretary Burlew's letter speaks to the intention to con-

fer jurisdiction to Kansas over all criminal offenses, including those listed in the Major Crimes Act:

The proposed relinquishment of jurisdiction to the State of Kansas appropriately extends to those offenses which are provided for in existing Federal statutes as well as to those which are not. The State courts have in the past exercised jurisdiction over offenses of both types to the general satisfaction of the tribes . . . The prosecution in the Federal courts of those offenses which are now open to such prosecution will not be precluded under the bill in any particular instance where this course may be deemed advisable.

H.R. Rep. No. 1999, at 5 and S. Rep. No. 1532, at 4.

Additionally, the letter from Mr. Burlew makes it clear that the letter and memorandum are only referring to the bill as originally drafted:

However, the bill, as now worded, does not express with entire accuracy the legal situation as it now exists or as intended to be created. The bill proposes to 'relinquish concurrent jurisdiction' to the State of Kansas, intending thereby to give the State jurisdiction of all types of crimes, whether major or minor, defined by State law. However, the Federal government has exercised jurisdiction only over major crimes. Therefore, strictly speaking, this is not a case of relinquishing to a State a jurisdiction concurrent with that of the United States, but a case of conferring upon the State *complete* criminal jurisdiction, retaining, however, jurisdiction in the Federal courts to prosecute crimes by or against Indians defined by Federal law. (emphasis added.)

H.R. Rep. No. 1999, at 3 and S. Rep. No. 1523, at 2.

The letter and memorandum also reflect a very practical concern of the Department of the Interior, namely, the fervent desire of the Department that Congress assist it in abdicating its trust responsibility toward the Indians of Kansas by relinquishing that responsibility to the state:

As the Indian Service is not now in a position to establish a law and order set-up on these four reservations, the superintendent is of the opinion that the maintenance of law and order will get into a precarious condition if the State authorities are not permitted to continue giving the Indians police protection.

H.R. Rep. No. 1999 at 5, S. Rep. No. 1523, at 4.

Petitioner's analysis of the legislative history of the Kansas Act is consistent with the analysis by Judge McManus in *Youngbear v. Brewer*. In that case, the defendant was a member of the Sac and Fox tribes. He was prosecuted by the State of Iowa for the crime of murder, one of the major crimes. The Iowa Supreme Court affirmed the conviction, rejecting Mr. Youngbear's argument that the courts of Iowa lacked jurisdiction to prosecute him. Since the law granting criminal jurisdiction to Iowa, Act of June 30, 1948, ch. 759, 62 Stat. 1161, Pub. L. No. 846, was exactly the same as the Kansas Act, Judge McManus analyzed the legislative history of the Kansas Act to determine congressional intent with regard to the Iowa Act. In his analysis of the legislative history of 18 U.S.C. section 3243, Judge McManus stated:

Also pertinent to the legislative history of a statute whose operative language is identical with that of P.L. 846 except for the designation of the State of Kansas rather than Iowa. That statute . . . was cited as the model to which Pub. L. 846 could be compared. H.R. Rep. 2356 at 3. The original draft of the bill conferring jurisdiction on the State of Kansas, H.R. 3048, did state that concurrent jurisdiction was relinquished to the State, and further expressly provided that 18 U.S.C. section 548 (Federal Major Crimes Act as then codified) was modified accordingly. 86 Cong. Rec. 5576, 76th Cong. 3rd Sess. (May 6, 1940). This bill was rejected, and the substituted bill which was subsequently enacted did not contain either the term 'concurrent' or the clause modifying the effect of the Federal Major Crimes Act.

By deleting this language, the only intent which can reasonably be inferred to Congress was to preserve exclusive Federal jurisdiction over the major crimes.

Evidence of this intent also appears in a letter from Representative W.P. Lambertson, a Kansas congressman whose district was affected by the bill. The letter, appearing in the report of the House Committee on Indian Affairs, H.R. Rep. 1999 at 2, 76th Cong. 3rd Sess. (1940), states that 'The Government here relinquishes to the State full jurisdiction over the Indians for *small offenses*.

*Youngbear v. Brewer*, at pages 812-813.

Judge McManus dismissed the letter from Secretary Burlew, stating:

Respondent cites a letter from then Acting Secretary of Interior which suggests that the bill would grant concurrent jurisdiction over the major crimes. H.R. Rep. 1999, 76th Cong., 3rd Sess. (1940). However, it appears that the letter refers to the original bill, which was drafted by the Interior Department and would have explicitly granted concurrent jurisdiction.

*Id.*, at page 813, no. 5.

The legislative history of the Kansas Act shows without doubt that Congress intended to retain exclusive federal jurisdiction over the major crimes.

#### CONCLUSION

For the reasons stated above, the decision of the Tenth Circuit should be reversed.

Respectfully submitted,

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